UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, **Plaintiff,** **- against -** **UNITED STATES DEPARTMENT OF DEFENSE,** **Defendant.**	**Index No. 05 Civ. 3941 (JSR)**

SUPPLEMENTAL MEMORANDUM IN OPPOSTION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

Through this lawsuit under the Freedom of Information Act ("FOIA"), the Associated Press ("AP") has sought from the Department of Defense ("DOD") the transcripts, evidence and related materials from the official records of military tribunals convened to determine the "enemy combatant" status of 538 men held at the U.S. Naval Base in Guantanamo Bay, Cuba ("Guantanamo"). DOD has produced to AP only heavily redacted copies of these records, withholding names, nationalities, ages, and religions, together with references to locations, employment, political organizations, friends and acquaintances, and any other information that might identify the individual detainee who is the subject of a specific tribunal.

DOD claims this "identifying information" must be withheld under FOIA Exemption 6 because its release would constitute an "unwarranted invasion" of the privacy of the detainees it is holding as enemy combatants. The privacy of the detainees is the sole ground for withholding information; DOD does not claim that releasing the redacted information would affect our national security or interfere in any way with DOD's performance of its duties.

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Pursuant to the Court's direction at the July 29, 2005 hearing on defendant's motion for summary judgment, this supplemental memorandum is submitted by AP to address the Court's authority to direct DOD to inquire of each Guantanamo detainee whether he actually objects to the release of identifying information contained in the records of his own Combatant Status Review Tribunal ("CSRT"). As demonstrated below, the actual wishes of the detainees whose privacy DOD says it must protect is indeed a relevant consideration under FOIA Exemption 6, and the Court plainly possesses authority to direct DOD to obtain and produce this relevant information in support of its request for summary judgment. As urged during oral argument, however, AP submits that such an inquiry of the detainees should be required only if the Court first determines that (a) Exemption 6 actually applies to personal information in the evidentiary record of a military tribunal (AP Mem. 11-13), and (b) the privacy interest asserted by DOD in a specific case outweighs the public interest in understanding and monitoring the actions being taken by DOD, (AP Mem. 13-23). If so, it would be appropriate for the Court to require DOD to present evidence in support of its motion that the detainees actually desire to assert their privacy interests in preventing disclosure of identifying information in the records of the tribunals.

ARGUMENT

1. Evidence of a Detainee's Intent to Protect His Privacy is Relevant Under FOIA.

There is no question that evidence about a detainee's desire either to protect his privacy or to allow full public knowledge of the record of his CSRT is relevant to the proper application of Exemption 6. It is well established that individuals may waive the personal privacy interests protected by FOIA if they so choose. *See, e.g., Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 364 (5th Cir. 2001) (individual may waive privacy interest); *Computer Prof'ls for Social Responsibility v. U.S. Secret Service*, 72 F.3d 897, 904 (D.C. Cir. 1996) (individual may waive privacy interest under Exemption 7(c)); *Summers v. U.S. Dep't of Justice*, 999 F.2d 570, 572 (D.C. Cir. 1993) (permitting unnotarized, unsworn privacy waivers).

The federal government thus routinely releases information it would otherwise withhold as protected by FOIA's privacy provisions upon the receipt of a valid privacy waiver. *See, e.g., Spurlock v. FBI*, 69 F.3d 1010, 1013 (9th Cir. 1995) (releasing additional documents after receiving waiver); *Taylor v. U.S. Dep't of Justice*, 257 F. Supp. 2d 101, 113 n.17 (D.D.C. 2003) (citing FBI declaration that third party may waive privacy interest). Indeed, DOD effectively did just this in response to AP's FOIA request, by releasing the names and other identifying information in the records of tribunals relating to those detainees who had filed habeas corpus petitions. In such cases, DOD deemed the detainee to have waived his privacy rights under Exemption 6 by commencing a public court proceeding. *See* Defendant's Memorandum in Support of Summary Judgment at 9 n.5; Declaration of Karen Hecker ("Hecker Decl.") ¶ 6 n.1.

2. The Court Has Authority to Require DOD to Submit Evidence of a Detainee's Desire to Protect His Privacy.

The Court plainly has the authority to require DOD to submit relevant evidence on whether an individual detainee actually wants his privacy to be protected. The Federal Rules of Civil Procedure explicitly provide the necessary authority. Rule 26(b)(1) provides: "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Rule 56(f) separately authorizes the Court to order "discovery to be had" when it appears that the evidence is not sufficient to determine a motion for summary judgment.[1] Rule 83(b) also provides that, when there is no controlling law, judges "may regulate practice in any

[1] Rule 56(f) normally is applied in response to a party's motion for additional discovery. *See, e.g., Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 302-03 (2d Cir. 2003). AP hereby moves for such discovery, if such a request is needed.

manner consistent with" federal law, the Federal Rules of Civil Procedure, and local rules. These provisions supply all necessary authority for an order requiring additional evidence from DOD in support of its motion. In a wide variety of circumstances, courts order parties to provide additional information needed to determine an issue. *See, e.g.*, *United States v. Abuhamra*, 389 F.3d 309, 332 (2d Cir. 2004) (authorizing district court to seek more information on remand); *Chang v. United States*, 250 F.3d 79, 86 (2d Cir. 2001) (court may expand record by requesting additional evidence); *In re Cendant Corp. Litig.*, 264 F.3d 201, 270 n.49 (3d Cir. 2001) (on its own initiative, court may seek further information); *Serras v. First Tennessee Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989) (court has power to order evidentiary hearing or discovery).

3. Requesting DOD to Submit Evidence of a Detainee's Intent Would Be Appropriate Under FOIA.

Asking DOD to demonstrate that a detainee specifically desires to prevent public release of information provided to the tribunal is appropriate under FOIA. "The privacy interest at stake in FOIA exemption analysis *belongs to the individual*, not the agency holding the information." *Sherman*, 244 F.3d at 363 (emphasis added) (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-65 (1989)). Requiring such a showing is particularly appropriate in this case, where many detainees have indicated through their families that they want their stories publicized. *See, e.g.*, Neil A. Lewis, *Relatives of Prisoners at Guantanamo Bay Tell of Anger and Sadness at Detentions*, N.Y. Times, Mar. 8, 2004, at 13 (describing "the battle for public opinion" over the detainees and the efforts of their families "to draw attention to the detainees' situation"); Susan Elan, *Relatives Plea for Detainees*, The Journal News (Westchester County), Mar. 11, 2004, at 4A (describing relatives who protested at the United Nations and spoke at a public forum attended by 600 people); Tim Elfink, *Families Protest in*

London over Kuwaitis Detention at Guantanamo, Assoc. Press, Nov. 22, 2004 (describing efforts of relatives of detainees to "publicize their cause").

If the Court concludes that a compelling privacy interest exists in information presented to the tribunals, it would thus be appropriate to require DOD to supply evidence that a detainee actually desires to protect his privacy. Judge Kessler adopted this approach in similar circumstances in *Center for National Security Studies v. U.S. Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *aff'd in part, rev'd in part on other grounds*, 331 F.3d 918 (D.C. Cir. 2003). Plaintiff in that case had filed a request for the names of more than 1,000 people secretly arrested in the aftermath of September 11. *Id.* at 96. As here, the government contended that the names of the detainees should not be released to protect their own privacy and safety. *Id.* at 105. Judge Kessler concluded that the public interest in learning their identities is "essential to verifying whether the Government is operating within the bounds of the law," but noted that the privacy and safety concerns raised by the Department of Justice were "not without merit." *Id.* at 106. To accommodate both interests, Judge Kessler established an "opt-out" mechanism, ordering the names released in 15 days unless the Department submitted signed statements from individual detainees requesting that their identities remain confidential. *See id.* at 106, 113.[2]

The "opt-out" procedure required by Judge Kessler is one regularly used by agencies which hold confidential information about third parties. For example, when the Navy receives a FOIA request for a record containing confidential commercial information submitted by a third-party that may be covered by Exemption 4 (trade secrets), it notifies the submitter of the information being requested, and affords the submitter "a reasonable amount of time" to object to disclosure. *See* 32 C.F.R. § 701.11(r)(1); *see also* 32 C.F.R. § 518.65 (Army). Indeed, all government agencies are required to have similar regulations to notify third-parties who submit confidential information that may be subject to a FOIA request. *See* Exec. Order No. 12600, 52 Fed. Reg. 23781 (June 23, 1987). And, as the Court has observed, federal judges are similarly notified and offered an opportunity to object when a member of the public requests disclosure of their financial information. *See* Ethics in Government Act of 1978, 5 U.S.C. App. 4 § 105(b)(3); U.S. Gen. Accounting Office, *Assessing and Formally Documenting Financial Disclosure Procedures Could Help Ensure Balance Between Judges' Safety and Timely Public Access* 9, GAO-04-696NI (June 2004) (describing the process established by the U.S. Judicial Conference's Committee on Financial Disclosure in which the judge has 14 days to request redactions from the report after being notified of a request).

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[2] The D.C. Circuit did not address this aspect of Judge Kessler's decision on appeal. *See Center for Nat'l Sec. Studies*, 331 F.3d at 925, 928.

Here, a similar opt-out mechanism would assist in the evaluation of whether genuine privacy interests are at risk. The government should not have any practical objection to this approach: DOD conducted only a limited number of CSRTs, and has provided redacted records from just 369 tribunals. DOD knows where the detainees are located and could readily notify the individuals whose information is being released to inform them of an opt-out process. Alternatively, the Court could authorize other methods for notifying detainees, such as allowing plaintiff or a third-party to contact the detainees directly.

Following the Supreme Court's decisions in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), DOD undertook a similar process, notifying the detainees that the CSRTs would be convened, and that U.S. courts had jurisdiction to consider petitions challenging the legality of their detention. *See* Hecker Decl. Ex. I, Enclosure 4. While the detainees are being held virtually *incommunicado*, the government has allowed the detainees to send and receive mail both through the military's Joint Task Force and the International

Committee of the Red Cross. *See* Rudi Williams, *Detainees Send, Receive Mail Via Joint Task Force, Red Cross*, American Forces Press Service, July 23, 2002.

If such a step is to be taken in this case, the Court should require DOD to act promptly. Late last week, DOD announced that it intends to transfer nearly 70 percent of the detainees currently held in Guantanamo to their home countries of Afghanistan, Saudi Arabia, and Yemen. *See* Josh White & Robin Wright, *Afghanistan Agrees to Accept Detainees*, Wash. Post, Aug. 5, 2005, at A1. Reportedly, this process could be completed within six months; and the dispersion of the detainees would make communication with them more difficult, if not impossible.

CONCLUSION

For the foregoing reasons, should the Court conclude that certain information withheld by DOD is properly subject to Exemption 6, it should require DOD to provide evidence that the relevant detainees actually wish to assert their right to privacy protected under that Exemption.

Dated: August 12, 2005

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS,	X	**ECF CASE**
Plaintiff,	:	**Index No. 05 CV 3941**
- against -	:	**Judge Rakoff**
UNITED STATES DEPARTMENT OF DEFENSE,	:	**PROOF OF SERVICE**
Defendant.	X	

STATE OF NEW YORK)
) SS.
COUNTY OF NEW YORK)

CHERYL CRONAN, being duly sworn, deposes and says as follows:

1. I am a administrative assistant with the law firm of Levine Sullivan Koch & Schulz, L.L.P. I am not a party to this action, am over 18 years of age, and reside in Brooklyn, New York.

2. On August 12, 2005, I caused to be served a true copy of the Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment by hand upon:

Elizabeth Wolstein
U.S. Attorney – Civil Division
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New York, NY 10007
Elizabeth.Wolstein@usdoj.gov

[signature]
Cheryl Cronan

Subscribed and sworn to before me
this 12th day of August, 2005

[signature]

LISAMARIE APPEL
Notary Public, State of New York
No. 01AP4869703
Qualified in Richmond County
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